THE ISLAMIC INHERITANCE LAW (*FARAID*): THE MANIFESTATION OF COMPREHENSIVE INHERITANCE MANAGEMENT IN ISLAM*

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PREFACE

The Islamic Inheritance Law (*faraid*) has been pre-ordained by Allah s.w.t. in a wise and gradual manner in order to allow for its compatibility with the judiciary and human nature which might find it difficult to change their normal practices. At the early stage, Islam perpetuated the inheritance laws of the *Jahiliyah*, a temporary system based on kinship and *Hijrah*. The system was then overruled and replaced by the inheritance distribution by will system (*wasiat*) to parents and kinsfolk based on verse 180 from Surah al-Baqarah. At the final stage, all previous systems were abolished and replaced with the current Islamic Inheritance Law. The law was derived from the commandments of Allah s.w.t. based on the *Mawarith* verses which are verses 11, 12 and 176 of Surah al-Nisa. The Islamic Inheritance Law today is a complete and comprehensive system for the rightful beneficiaries, the portions for each beneficiary and all non-rightful beneficiaries to the inheritance using *al-Hajb* doctrine or method.

Allah s.w.t. has determined the rulings and methods to distribute inheritance among all beneficiaries with the purpose to act fairly to all levels of beneficiaries and to avoid discrepancies among them.

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At the end of the verses 11, 12 and 176, surah al-Nisa, Allah s.w.t. commanded meaning:
“Indeed, Allah is ever Knowing and Wise”, “[This is] an ordinance from Allah, and Allah is Knowing and Forbearing” and “Allah makes clear to you [His law], lest you go astray. And Allah is Knowing of all things”.

SOURCES OF ISLAMIC INHERITANCE LAW AND THE VERDICT TO LEARN IT

Faraid is based on the al-Quran, al-Sunnah, the consensus of the Prophet's (peace and blessings be upon him) companions and their *ijtihad* (the process of making a legal decision by independent interpretation of the legal sources, the al-Quran and the Sunnah). In the al-Quran, there are two verses related to inheritance which are the *mujmal* verse and the *mufassal* verse. The verses in the first category explain the beneficiaries' rights in general without discussing their portions in detail. While the verses in the second category, which is the *al-mawarith* verse, Allah s.w.t. explained in detail regarding the beneficiaries and the portions or shares for each of the beneficiary.

Among the verses that are *mujmal* in nature, Allah s.w.t commanded meaning:

"*For men is a share of what the parents and close relatives leave, and for women is a share of what the parents and close relatives leave, be it little or much - an obligatory share*" (al-Quran, al-Nisa' 4:7).

"*But those of [blood] relationship are more entitled [to inheritance] in the decree of Allah. Indeed, Allah is Knowing of all things*" (al-Quran, al-Anfal 8:75).

In the *al-mawarith* verse, Allah s.w.t. has explained in detail with regard to the beneficiaries and their portions in the inheritance meaning:

i) "*Allah instructs you concerning your children: for the male, what is equal to the share of two females. But if there are [only] daughters, two or more, for them is two thirds of one's estate. And if there is only one, for her is half. And for one's parents, to each one of them is a sixth of his estate if he left children. But if he had no children and the parents [alone] inherit from him, then for his mother is one third. And if he had male siblings [or Female siblings], for his mother is a sixth, after any bequest he [may have] made or debt. Your parents or your children - you know not which of them are nearest to you in benefit. [These shares are] an obligation [imposed] by Allah. Indeed, Allah is ever Knowing and Wise*" (al-Quran, surah al-Nisa' 4: 11).

ii) "*And for you is half of what your wives leave if they have no child. But if they have a child, for you is one fourth of what they leave, after any bequest they [may have] made or debt. And for the wives is one fourth if you leave no child. But if you leave a child, then for them is an eighth of what you leave, after any bequest you [may have] made or debt. And if a man or woman leaves neither ascendants nor descendants but has a brother or a female sibling, then for each one of them is a sixth. But if they are more than two, they share a third, after any bequest which was made or debt, as long as there is no detriment [caused]. [This is] an ordinance from Allah, and Allah is Knowing and Forbearing*" (al-Quran, surah al-Nisa'4: 12).

iii) "*They request from you a [legal] ruling. Say, "Allah gives you a ruling concerning one having neither descendants nor ascendants [as beneficiaries]." If a man dies, leaving no child but [only] a female sibling, she will have half of what he left. And he inherits from her if she [dies and] has no child. But if there are two Female siblings [or more], they will have two-thirds of what he left. If there are both male siblings and Female siblings, the male will have the share of two females. Allah makes clear to you [His law], lest you go astray. And Allah is Knowing of all things*" (al-Quran, surah al-Nisa' 4: 176).

Based on all three verses above, it can be concluded that:

1) The principle of inheritance distribution in Islam is that the portion for a male beneficiary is equivalent to two parts of the female beneficiary. This principle is applied in many inheritance cases especially in the case of *asabah bi al-ghayr*. The distribution of inheritance in such a case must be made based on the method that a male beneficiary's portion is equivalent to two parts of the female beneficiary's portion.

2) The beneficiaries from *ashab al-furud* and *asabah bi al-ghayr* have been clearly defined along with their individual inheritance portion. Among the *ashab al-furud* beneficiaries mentioned in that verse include a daughter, mother, father, husband, wife, male siblings of the same mother, female

siblings of the same mother, female siblings of the same parents and female siblings of the same father.

3) The distribution of inheritance among the beneficiaries must be made after all debts being either debts to Allah s.w.t. (such as *zakat*, *kaffarah*, etc.), or debts to fellow human beings and after the deceased's will is settled (if any) on a 1/3 rate from the total inheritance amount.

Other than evidence (*nas*) from al-Quran, there are also the Prophet's (peace and blessings be upon him) *hadiths* which explain and detail out the meaning from al-Quran with regards to the beneficiaries and their shares; among them is the Prophet's (peace and blessings be upon him) saying meaning:

"*One-half is for daughter and one-sixth for the son's daughter, i.e. both shares make two-thirds of the total property; and the rest is for the female sibling*." (Hadith by al-Bukhari).

"*Give the shares to those who are entitled to them, and what remains over goes to the nearest male beneficiary*" (Hadith by Muslim)

In addition to the evidence of the al-Quran and the Sunnah, the consensus of the companions and *tabi'in* (Muslims after the era of Prophet Muhammad [peace and blessings be upon him]) have also occurred in the distribution of inheritance, in which a grandmother or two grandmothers (mother's mother and mother's father) share equally in 1/6 portion. Similarly, the companions did their *ijtihad* in some inheritance problems such as in the case of *al-Umariyyatain*, *al-Musyarakah*, a grandfather's bequeathing while being with a relative (male or female) of the same parents or the same father, *dhawi al-arham* inheritance, and so forth.

Based on the evidences above, it can be concluded that learning about *faraid* is obligatory *kiifayah* (*fardhu kifayah*) to all Muslims and it will become void once some other Muslims have learned it, but the ruling that says it is *sunat* to study it remains. Similarly, the ruling of implementing the Islamic inheritance distribution (*faraid*) is mandatory (*wajib*).

REFORMATION IN THE ISLAMIC INHERITANCE LAW

Before Islam, especially during the time of ignorance of divine guidance (*Jahiliyah*), daughters, wives, mothers and other female beneficiaries were not given any right at all in inheritance distribution. Similarly, children who have not reached puberty were not given inheritance rights. Inheritance was only applicable to men who could defend their families and tribes from the enemy's attack. Inheritance was only based on heredity (for adult men), agreement and foster children.

After the descent of the *al-mawarith* verses, Islamic Inheritance Law introduced a reformation in inheritance law, where women are recognised by Islam by giving them the legal status of beneficiaries and their specific shares in the inheritance are determined. Of the 12 beneficiaries of *ashab al-furud*, 8 are female beneficiary and only 4 are male beneficiaries. Among the reformations introduced in the Islamic Inheritance Law include:

1) Inheritance rights of beneficiaries are based on the relationship of consanguinity (kinship), marriage contract, *wala'* and Islam.

2) Not to deny the rights to inheritance among male and female, big or small, all of whom are entitled to the inheritance left by the benefactor (the deceased).

3) Parents and children are not left out from receiving inheritance in any condition. Their portion of the inheritance might change if there are other beneficiaries.

4) Male and female siblings will not receive the inheritance if the parents of the deceased are still alive. The presence of siblings/relatives will reduce the mother's share from 1/3 to 1/6.

5) Where there are male and female beneficiaries in a single case, the male beneficiary will take two parts of the female beneficiary's shares, or two parts for the male beneficiary and one part for the female beneficiary.

GENERAL POLICIES IN THE ISLAMIC INHERITANCE LAW

The Islamic Inheritance Law is built on a solid foundation which does not exist in any other inheritance system. These policies are the key criteria of the Islamic Inheritance Law, namely:

1) *Al-Wasatiyyah*, a system which is intermediate (*wasatiyyah*) in nature compared to the capitalist and communist systems. Individual ownership is recognised and guaranteed through the Islamic Inheritance Law.

2) *Al-Tawazun*, a system that provides balance to the wealth owner to dispose of his wealth in the distribution of 1/3 for charity through a will, and the remaining 2/3 as inheritance for the beneficiaries according to the Islamic law.

3) *Al-Adalah,* a fair system of distribution of inheritance to all beneficiaries based on human nature, needs, and their closeness to the benefactor.

4) *Al-Ijbar*, a system which necessitates all beneficiaries to receive the inheritance through *faraid* and the benefactor may not prevent any beneficiary from receiving a portion of the inheritance. It is obligatory that all beneficiaries receive the inheritance immediately after the benefactor's death, unless he/she relinquishes his/her rights.

5) Inheritance among immediate family members, which refers to inheritance among the closest kin to the benefactor such husband, wife, parents, children, male siblings, uncles and relatives on the maternal side (*dhawi al-arham*) [according to Abu Hanifah and Ahmad ibn Hanbal].

6) The establishment of portions for each beneficiary which means that all *fardu* and *asabah* beneficiaries will receive their shares. Shares for the *ashab al-furud* beneficiaries have been determined by Allah s.w.t. which can be either 1/2, 1/4, 1/8, 2/3, 1/3, or 1/6 as described in the al-Quran.

7) Members of the comprehensive (*syumul*) beneficiaries, the beneficiaries who are entitled to receive a portion of the inheritance include all the beneficiaries or relatives, whether big or small, old or young, rich or poor, even the foetus in the

womb of its mother is given the right to inheritance. Similarly, a husband or a wife is entitled to receive the wealth even though they are not relatives, but they share the sacred relationship of a marriage, the sacrifice, mutual cooperation and loyalty between them.

8) Rights of women and children in inheritance and their portions, which means that women's and children's rights are guaranteed in the Islamic inheritance. The portions to be rightfully received by women are either 2/3, 1/3, 1/6, 1/2, 1/4 or 1/8. Children receive the same portions of inheritance, whether they are big or small.

9) Preference to relatives who are closer to the benefactor if there is no specific barrier which may prevent them from receiving the inheritance.

10) Compromisation on the portions (*al-tafadul*) in the distribution of inheritance is based on the needs of the beneficiaries (*al-hajah*). For example, women and small children have more needs to the wealth, the deceased's children have more needs to the wealth compared to their father and grandfather, and men have more needs to the wealth compared to women because men must assume certain responsibilities in Islam.

11) Islamic inheritance law is permanent (*thabat*) in nature; it does not change and may not interchange even though time, location and individuals are subject to changes because it is the commandment of Allah s.w.t. through the al-Quran and the Sunnah of the Prophet (peace and blessings be upon him) except in cases of a grandfather's inheritance while being with siblings/relatives in receiving the inheritance and *wajibah* will which has rooms to be *ijtihad*.

ASPECTS OF COMPREHENSIVENESS IN ISLAMIC INHERITANCE LAW

The Islamic Inheritance Law is a comprehensive inheritance distribution system similar to other fields of Islamic law. The comprehensive manifestation of this law can be seen in several aspects such as reasons for inheritance, liabilities and rights of inheritance, the determination of rightful beneficiaries and the portion they should receive, the filtering of the beneficiaries using the *al-hajb* doctrine, the

apportion of inheritance to a foetus, *khuntha* and *mafqud*, *takharuj* doctrine and so forth.

1. THE PRINCIPLES AND LIABILITIES IN INHERITANCE DISTRIBUTION

Inheritance in Islam will not take place unless the reasons for the inheritance and the three pillars coincide which include *al-muwarrith*, *al-warith* and *al-mauruth*. *Al-Muwarrith* is when a benefactor dies, whether genuinely, *taqdiri* or *hukmi*. *Al-Warith* is a beneficiary who will receive an inheritance and is required to be alive during the demise of the benefactor, whether genuinely, *hukmi* or *taqdiri*. While *al-Mauruth* refers to the inheritance wealth owned by the benefactor, be it liquid or solid wealth and all rights associated with the wealth.

Islamic Inheritance Law determines four reasons for inheritance, all four reasons being consanguinity (*nasab*), marriage, *wala'* and Islam (*Baitulmal*).

Although all four reasons for inheritance have been met, the distribution of inheritance will not occur unless the conditions below are met in full, namely:

i) The benefactor had died either genuinely, *hukmi* or *taqdiri*.

ii) All beneficiaries must exist or alive, either genuinely or *taqdiri*, at the time of the benefactor's demise.

iii) Aware of the status and rightful shares for the beneficiaries, and there is no inheritance obstruction, such as murder, slavery and differences in religion.

According to Islamic Inheritance Law, when the pillars and conditions have been met, the inheritance is subject to a few liabilities or responsibilities that must be fulfilled by the beneficiaries before it can be apportioned according to *faraid* distribution. The liabilities or responsibilities must be fulfilled in the order of the following priorities:

i) Making payment for the funeral rites and expenses such as expenditures for bathing and shrouding the corpse, bringing it to the cemetery, digging the grave and burying it according to a modest rate.

ii) Settling the debts of the deceased whether debts to Allah s.w.t. such as alms (*zakat*), atonement (*kaffarah*), vows (*nazar*) and obligatory *hajj*, or debts to other human beings in the opinions of majority (*jumhur*). The Hanafi sect does not require debt repayment for Allah s.w.t. as it was removed by death itself.

iii) Resolving matrimonial property claim by the still-living spouse if the wealth is acquired during the marriage and both parties have their respective contributions, whether directly or indirectly. The rate will be decided by the Islamic Law Court.

iv) Carrying out the will made by the deceased (if any) on the rate of 1/3 of the property after settling the matters described above. Also, a will cannot be made to the rightful beneficiary of the inheritance even though the rate is less than 1/3, unless agreed by other beneficiaries and the agreement is obtained after the benefactor's demise and not while he/she was still alive.

v) Distribution of the inheritance to the rightful beneficiaries according to *faraid* following the settlement of all things mentioned above.

2. DETERMINATION OF THE BENEFICIARIES AND THE PORTION

Islamic Inheritance Law has clearly and comprehensively determined that the beneficiaries are entitled to receive a portion of the inheritance and their respective portions as described in the al-Quran. Beneficiaries grouping can be categorised into three types, namely the *ashab al-furud*, *asabah* and *dhawi al-arham*.

(a) *Ashab al-furud* Beneficiaries

Ashab al-furud beneficiaries are those who have designated portions or shares in the distribution of inheritance according to the al-Quran, the Sunnah and the consensus. *Ashab al-furud* consists of 12 groups namely: husband, wife, mother, father, grandfather (father's father), grandmother (mother's mother and father's

mother), daughters, daughter to a son (granddaughter), female sibling of the same parents, female sibling of the same father, female sibling of the same mother and male sibling of the same mother. *Ashab al-furud* group is the most important group of the beneficiaries and comes first in the distribution and receiving of inheritance compared to the *asabah* and *dhawi al-arham* beneficiaries. *Ashab al-furud* beneficiaries will receive either one of the following shares or *fardu*, namely 1/2, 1/4, 1/8, 1/6, 1/3, 2/3 or 1/3 balance.

i) Husband

Gets 1/2 if his wife (the deceased) does not have any children (male or female) or grandchildren or younger, or 1/4 if the deceased has a child (male or female) or grandchildren or younger.

ii) Wife

Gets 1/4 if the deceased (the husband) does not have any children (male or female) or grandchildren or younger, or 1/8 if the deceased has a child (male or female) or grandchildren or younger.

iii) Father

Gets 1/6 if the deceased has a son, or a son from a son or younger, or 1/6 and *asabah* if the deceased has a daughter, or *asabah* if the deceased does not have any children (male or female), daughter to a son or younger.

iv) Grandfather (father to a father)

The position of a grandfather is similar to the father, but the grandfather will not inherit anything as long as there is a father because a grandfather is shielded by the father. The grandfather will get 1/6 or 1/6 and *asabah* or *asabah* which is the similar to the father.

v) Mother

Gets 1/6 if the deceased has a son, or a daughter to a son or younger, or has a few siblings (male or female); or 1/3 of the total inheritance value if the deceased has no such beneficiaries as mentioned above; or 1/3 balance if the

deceased left behind either a husband or a wife and a father without other beneficiaries (in the case of *Umariyyatain* only).

vi) Grandmother

A grandmother will not receive any portion of the inheritance as long as there is the mother. The grandmother only receives 1/6 be it one person or more.

vii) Daughter

Gets 1/2 if there is only one daughter, 2/3 if there are two or more daughters or gets *asabah bi al-ghayr* while being together with the son. A son gets two parts of a daughter's portion.

viii) Daughter to a son

Gets 1/2 if one; 2/3 if there are two or more, 1/6 if the daughter is with a female child; gets *asabah bi al-ghayr* when being with a son to a son or shielded by a son or by two daughters, except when there is a son to a son who also receives *asabah bi al-ghayr*.

ix) Female sibling of the same parents

Gets 1/2 if there is only one; 2/3 if there are two or more; *asabah bi al-ghayr* while being with a male sibling of the same parents; *asabah ma'a al-ghayr* while being with a daughter or a daughter to a son or with both; or is shielded by the son or a male grandson or younger.

x) Female sibling of the same father

Gets 1/2 if one; 2/3 if two or more; 1/6 if with a female sibling from the same parents; *asabah bi al-ghayr* if with a male sibling of the same father; *asabah ma'a al-ghayr* while with a daughter or a daughter to a son, or with both; or shielded by a son, a grandson, a father, a male sibling of the same parents, two female siblings of the same parents (except when there is a male sibling of the same father) and by a female sibling of the same parents when she is receiving *asabah ma'a al-ghayr.*

xi) Female sibling of the same mother

Gets 1/6 if alone, or 1/3 if two or more; or shielded by male or female descendants, father or grandfather.

xii) Male sibling of the same mother

Gets 1/6 if alone, or 1/3 if two or more; or shielded by either male or female descendants, father or grandfather.

The *ashab al-furud* beneficiaries are divided into three classes, namely:

a) The main beneficiaries comprising husband, wife, mother, father and daughter. They are absolutely not dropped from receiving the inheritance.

b) Replacement beneficiaries comprising grandfather, grandmother and daughter of a son. These beneficiaries will replace of the main beneficiaries in receiving the inheritance such as the grandfather replacing the father; the grandmother replacing the mother and a daughter to a son replacing the daughter.

c) Alongside beneficiaries (*hawasyi*) comprising a female sibling from the same parents, a female sibling of the same father and male and female siblings of the same mother.

(b) *Asabah* Beneficiaries

According to the *faraid* term, *asabah* beneficiary is a beneficiary whose portion of the inheritance is not clearly defined by either the al-Quran or the Sunnah. Sometimes they receive all of the inheritance; sometimes just the balance and sometimes they do not receive any inheritance at all because the inheritance has all been spent by the *ashab al-furud* beneficiaries.

Types of *Asabah*

Asabah is divided into two types namely *asabah sababiyyah* (*qarabah hukmiyyah*) which refers to the *asabah* for those who free slaves and *asabah nasabiyyah* which refers to the beneficiaries who have blood relationships (relatives) with the deceased. This group may consists of men without any woman in between

such as son, son to a son, father, grandfather, male sibling of the same parents, the same father, uncle of the same parents, the same father and their son. Similarly, the female *ashab al-furud* beneficiaries when with their male siblings such as daughter when with a son, female sibling of the same parents when with a male sibling of the same parents and female sibling of the same father when with a male sibling of the same father. They are the *asabah nasabiyyah* beneficiaries.

Asabah nasabiyyah is divided into three types namely:

1) ***Asabah bi al-nafs*****:** namely *asabah* with himself. The beneficiaries in this category include all male beneficiaries of the deceased without any woman in between. They consist of 12 people namely a son, a son to a son, father, grandfather, male sibling of the same parents, male sibling of the same father, a son to a male sibling of the same parents, a son to a male sibling of the same father, an uncle (the father's side) of the same parents, an uncle (the father's side) of the same father, a son to an uncle of the same parents and a son to an uncle of the same father.

   Asabah bi al-nafs is divided into four levels according to priority in receiving the balance (*asabah*), namely:

   a) *Jihat al-bunuwwah;* namely a son, son to a son or younger as long as there is no woman in between.

   b) *Jihat al-ubuwwah;* namely the father, grandfather or older as long as there is no woman in between.

   c) *Jihat al-ukhuwwah;* namely a male sibling of the same parents, a male sibling of the same father, a son to a male sibling of the same parents, a son to a male sibling of the same father or younger as long as there is no woman in between.

   d) *Jihat al-umumah;* namely an uncle (from the father's side) of the same parents, an uncle (from the father's side), a son to an uncle of the same

parents, a son to an uncle of the same father or younger as long as there is no woman in between.

According to *faraid* method, *jihat al-bunuwwah* is given priority over *jihat al-ubuwwah*, while *jihat al-ubuwwah* is given priority over *jihat al-ukhuwwah* and so on according to the arrangement or order. The distribution of *jihat* above is according to the opinion of Imam Abu Hanifah. Nonetheless, according to the consensus of majority of *ulama'* including the Syafi'e sect, they place a grandfather (father to a father or older) and a male sibling (of the same parents or the same father) in one *jihat*.

2) ***Asabah bi al-ghayr* Beneficiaries:** the *asabah bi al-ghayr* beneficiaries comprise four female beneficiaries from the *ashab al-furud* beneficiaries namely the daughter, the daughter to the son, the female sibling of the same parents and the female sibling of the same father. They will receive the balance (*asabah*) while being with their male siblings of their equivalent, such as a daughter while being with a son, a daughter to a son while being with a son of a son, the female sibling of the same parents while being with a male sibling of the same parents and a female sibling of the same father while being with a male sibling of the same father. The distribution rate in the *bi al-ghayr* balance (*asabah*) is that the male beneficiary's portion is equivalent to 2 parts to the female beneficiary's portion or following a ratio rate of 2:1 whereby 2 parts for a male beneficiary and one part for a female beneficiary.

There are a few conditions in order to allow for the male beneficiary of *asabah bi al-ghayr*, together with their male siblings, to receive the balance (*asabah*) of the property namely:

(i) The female beneficiary who has become an *asabah bi al-ghayr* must be an *ashab al-furud* beneficiary.

(ii) There exist similarities in *jihat* between the *ashab al-furud* female beneficiary with the male beneficiary who has made her an *asabah*.

Thus, a daughter may not be made an *asabah* by the male sibling of the same parents or of the same father.

(iii) There exist similarities in stature between an *ashab al-furud* female beneficiary with the male beneficiary who has made her an *asabah*. Therefore, a daughter of a son may not be made an *asabah* by the son, and a female sibling of the same parents may not be made an *asabah* by the son of a male sibling from the same parents.

(iv) There exist similarities in a strong kinship between an *ashab al-furud* female beneficiary with the male beneficiary who has made her an *asabah*. Thus, a female sibling of the same parents may not be made an *asabah* by a male sibling of the same father.

There are a few exceptions to the original rules of *asabah bi al-ghayr* above with regards to the daughter of a son and grandfather together with the female siblings of the same parents or of the same father. A daughter to a son can be made an *asabah* by a son of a son's son (great grandson). For example, a person dies and leaves behind two daughters, a daughter to a son (a granddaughter) and a son to a son's son (great grandson), thus, the daughters receive 2/3, the daughter to a son and a son to a son's son (great grandson) together receive the remaining (1/3) portion of the inheritance with the male receiving two parts and the female one part (ratio 2:1).

3) ***Asabah ma'a al-ghayr* Beneficiaries:** *asabah ma'a al-ghayr* beneficiaries consist of only two types of people namely female siblings from the same parents and female siblings of the same father when receiving the inheritance together with a daughter or a daughter to a son or with both. Female siblings of the same parents or female siblings of the same father will receive the balance (*asabah*) of the inheritance, if there is any, after it has been given to the *ashab al-furud* beneficiaries namely the daughter or the daughter to a son. For example, a person dies and leaves behind a wife, a mother, a daughter, a daughter to a son and a female sibling of the same parents, thus the wife gets 1/8, the mother gets 1/6, the daughter gets 1/2, the daughter of a son gets 1/6 and the female sibling of the same parents receives the balance (*asabah*).

There are two conditions under which the female siblings of the same parents can become *asabah ma'a al-ghayr* beneficiary namely:

(i) The female siblings of the same parents or female siblings of the same father must inherit together with the daughter, or a daughter to a son, or both.

(ii) There is not a male sibling of the same parents or a male sibling of the same father among them. If there is a male sibling of the same parents or a male sibling of the same father, then the female sibling of the same parents or female sibling of the same father receives *bi al-ghayr* balance (*asabah*) and the distribution is based on 2:1 ratio.

The position of female siblings of the same parents or female siblings of the same father who become the *ma'a al-ghayr* balance (*asabah*) beneficiary is similar to that of a male sibling of the same parents or male sibling of the same father. This means that they can protect the other beneficiaries who are shielded by their male siblings.

c) *Dhawi al-Arham* Beneficiaries

Dhawi al-arham is a beneficiary who has family kinship or blood relationship with the deceased other than the *ashab al-furud* beneficiaries and *asabah,* whether male or female, such as a son and a daughter to a daughter, a son and a daughter to a female sibling, an uncle from the mother's side, an aunt from father's and mother's sides, father of mother and so on.

Fuqaha* Opinions on the Inheritance of *Dhawi al-Arham

The *Fuqaha* has disagreeing opinions on the inheritance *dhawi al-arham* which formed two groups, namely:

(i) According to Sayyidina Ali, Umar, Ibn Mas'ud, Ibn Abbas, Muaz bin Jabal, Mujahid, Ikramah, Shurayh, Masruq, al-Nakhai', al-Sha'bi and the others, they were of the opinion that the *dhawi al-arham* beneficiaries are entitled to the inheritance when there is no *ashab al-furud* and *asabah* beneficiaries, except for the husband or wife. This

opinion represents the opinions of Imam Abu Hanifah and Ahmad bin Hanbal.

(ii) According to Sayyidina Abu Bakr, Uthman, Zayd bin Thabit, Sufyan al-Thawri, al-Zuhri, al-Awzai, Ibn Jarir al-Tabari and jurists of Hijaz, they were of the opinion that *dhawi al-arham* beneficiaries may not inherit the inheritance because there is no clear evidence from the al-Quran, the Sunnah and the consensus. This opinion represents the opinions of the Syafi'e sect, the Maliki sect, and Ibn Hazm al-Zahiri.

Conditions and Method of Inheritance in *Dhawi al-Arham*

For the first group who are of the opinion that the *dhawi al-arham* beneficiaries are entitled to the inheritance, they have established the following two conditions namely:

i) There are no *ashab al-furud* beneficiaries and if there are any, they will take their portion as *ashab al-furud* beneficiaries and the balance according to the *al-radd* method.

ii) There are no *asabah* beneficiaries and if there are any, all inheritance will be spent by the *asabah* beneficiaries.

Among the *fuqaha* who allow *dhawi al-arham* to receive inheritance, they however have different opinions on how the inheritance should be inherited as follows:

i) *Ahl al-Rahm* Method: this method is known as *altaswiyah* stream which is to equalise all *dhawi al-arham* beneficiaries in receiving the inheritance. Therefore, there is no difference between near and distant beneficiaries and between male and female beneficiaries. Distribution of the inheritance is done equally as their inheritance is solely based on their family relationships (womb) to the deceased.

ii) *Ahl al-Tanzil* Method: this method is known as a method of succession as they put the descendants of the deceased from the *dhawi al-arham* in place of their parents who connect them with the deceased, whether

from among the *ashab al-furud* or *asabah* and their shares are also similar, whether by obligatory (*fardhu*) or *asabah* and the portion of a male is twice the share of a female.

iii) *Ahl al-Qarabah* Method: this method looks at the closeness and the strength of the relationship between the *dhawi al-arham* beneficiaries to the deceased either in *jihat*, stature or power of the blood relationship (*qarabah*) as in the case of *asabah bi al-nafs* inheritance.

3. FILTERING BENEFICIARIES BY *AL-HAJB* DOCTRINE (PARTITIONING)

The *al-hajb* doctrine plays a crucial role in the Islamic Inheritance Law as it will determine the status of the beneficiaries whether they are entitled to the inheritance or otherwise. A beneficiary is not entitled to the inheritance on the basis that there are other beneficiaries who have closer relationship and stature with the deceased, thus the beneficiaries are removed in absolution (*hajb hirman*). At times there are also beneficiaries who will receive slightly less portion of the inheritance because of the existence of other beneficiaries who are capable of reducing their portion by means of non-absolution (*hajb nuqsan*).

From the perspective of terminology, the *al-hajb* doctrine means any restriction or prohibition on the beneficiaries from receiving the inheritance in whole or in part because there are other beneficiaries who have more rights on the inheritance. For example, a grandfather is prevented or shielded by a father from getting the inheritance, and a husband is prevented or shielded from getting 1/2 portion to 1/4 portion and so on by a son or a daughter of the deceased. The role of the *al-hajb* doctrine in the Islamic Inheritance Law is a filtering process onto the beneficiaries to determine their rights and stature in an inheritance distribution.

Al-Hajb Distribution (Partitioning)

Al-Hajb is divided into two parts namely *al-hajb bi al-wasf* and *al-hajb bi al-shakhsi*. *Al-hajb bi al-wasf* has the probability of happening to all beneficiaries if there is a certain characteristic or restriction such as murder, slavery and difference in religion. While *al-hajb bi al-shakhsi* occurs because of the existence of certain

beneficiaries (who are closer) who can shield other beneficiaries, whether by *hirman* or *nuqsan*.

According to the inheritance law, *al-hajb bi al-shakhsi* is divided into two types namely *hajb hirman* and *hajb nuqsan*.

1) Examples of *Hajb Nuqsan*

Hajb nuqsan is a shield that could reduce the beneficiaries' portions from getting a larger share to getting a lower or smaller share because there are other beneficiaries. *Hajb nuqsan* can happen to the five *ashab al-furud* beneficiaries as follows:

a) A husband may be shielded by means of *hajb nuqsan* from getting the 1/2 portion to 1/4 portion because the deceased has a child whether a son or a daughter and whether the child is from the deceased's husband or a different husband.

b) A wife may be shielded by means of *hajb nuqsan* from getting the 1/4 portion to 1/8 portion because the deceased has a child whether a son or a daughter and whether the child is from the deceased's wife or a different wife.

c) A daughter to a son can be shielded by means *hajb nuqsan* from getting the 1/2 portion to 1/6 portion because the deceased has a daughter.

d) A female sibling from the same father can be shielded by means of *hajb nuqsan* from getting 1/2 portion to 1/6 portion because the deceased has a female sibling from the same parents.

e) A mother can be shielded by means of *hajb nuqsan* from getting 1/3 portion to 1/6 portion because the deceased has a child (male or female), or the deceased has a few male siblings or female siblings of the same parents, of the same father or of the same mother.

2) Examples of ***Hajb Hirman***

Hajb Hirman is a prohibition or deterrence to a beneficiary from getting the inheritance in absolution. *Hajb Hirman* can happen to the seven groups of beneficiaries as follows:

a) A grandfather may be shielded by means of *hajb hirman* by a father.

b) A grandmother may be shielded by means of *hajb hirman* by a mother.

c) Female siblings of the same parents can be shielded by means of *hajb hirman* by either a son, a son to a son or a father in a consensus. However, according to Abu Hanifah, a grandfather may also shield the female siblings of the same parents by means of *hajb hirman*.

d) A female sibling from the same father is shielded by *hajb hirman* by two female siblings from the same parents, if she is not with a male sibling of the same father.

e) Relatives (male or female) from the same mother are shielded by *hajb hirman* by a father, a grandfather, a son, a daughter, a son to a son, and a daughter to a son.

f) A daughter to a son is shielded by *hajb hirman* by two daughters, if there is no son to a son together with her.

g) A son of a son is shielded by *hajb hirman* by a son.

However, there are six groups of *ashab al-furud* and *asabah* beneficiaries who are not at all involved with *hajb hirman*. They are fathers, mothers, sons, daughters, husbands and wives. These beneficiaries have direct relationship with the deceased without any intermediate beneficiary (*wasitah*), thus they will receive their portion of the inheritance in any condition. A majority of the beneficiaries (other than the son) are only involved with *hajb nuqsan*.

3. INHERITANCE RIGHTS FOR THE FETUS, *KHUNTHA* AND *MAFQUD*

Islamic Inheritance Law determines the rights to inherit to a few specific groups among which include the foetus in the womb of its mother, *khuntha* and *mafqud*. The Islamic Inheritance Law, as a comprehensive system, protects the rights of these three groups and ensures justice to them.

With regards to the inheritance rights for a foetus, the *fuqaha* agrees that a foetus is entitled to the inheritance of a deceased benefactor together with the other beneficiaries. However, the inheritance rights for the foetus are subject to two conditions namely:

i) The foetus is already present in its mother's womb at the time of death of the benefactor.

ii) The foetus is born alive even for a few seconds.

The Islamic Inheritance Law identifies several signs that indicate that the foetus is born alive such as crying, feeding, breathing, moving its limbs and so forth. The *fuqaha* has different opinions whether the whole body of the foetus has to be born alive or just partially. The Syafi'e, Maliki and Hanbali sects require that the foetus be born alive as a whole. If only some parts of the foetus are born alive and then it passes away, the foetus is not entitled to inherit the inheritance even though the birth was followed by tears.

After fulfilling the conditions above, the foetus has the rights to the inheritance and the portions of the inheritance should be kept for it until its birth. According to the majority of *fuqaha*, the inheritance can be distributed before the birth of the foetus, but the portion that should be kept for it is the maximum whether it is a male or female. For the Maliki sect, the inheritance cannot be distributed until the baby is born.

Inheritance for the *khuntha* has been discussed in the Islamic Inheritance Law in detail to ensure their status and position in receiving the inheritance either as a male or female beneficiary. In Islamic law, a *khuntha* is a person who has both male

and female genitals, or has no sign of being either a male or a female, but only has a point for urination. In the problem of determining the sex of a *khuntha*, *faraid* scholars have determined a few signs to identify the gender.

One of the signs is if a *khuntha* is still a child, then the sex can be determined by observing the point where it urinates through either a male or female genital. If it urinates through the penis, it is treated as a male and inherits as a male beneficiary. If it urinates through the female genital, it is treated as a female and inherits as a female beneficiary. If it urinates from both sexual organs, then it should be observed from which genital the urine is produced more. If the urine comes out more from the penis, then the *khuntha* is regarded as a male and vice versa.

But the majority of *fuqaha* think that the determination of sex should be made by observing which of the genitals that produce urine first. If the urine comes out from the penis first, then the *khuntha* is regarded as a male and vice versa. If the *khuntha* is an adult, then the indicators that prove him a man are the signs such as having moustache, beard and the likes. Then, it is regarded as a man and inherits as a male beneficiary. If there are signs that the *khuntha* is a woman such as having menstruation, growing breasts, pregnancy and the likes, the *khuntha* is regarded as a woman and inherits as a female beneficiary.

There are some opinions which state that if the gender of a *khuntha* cannot be determined, then the gender will be determined by counting the number of rib bones at the bottom left side of the body. If it is obvious that the number of rib bones on the left is less than the right, it is regarded as a male beneficiary. There are other views which say that the gender determination of a *khuntha* is determined by its instinct and desire either towards a female or a male. If its interest inclines towards a woman, it is regarded as a man and vice versa.

In the *mafqud* problem, the Islamic Inheritance Law pays special attention to the distribution of inheritance to them. *Mafqud* means a person who is missing without knowing the status whether the person is still alive or has passed away. In the case of a missing person, the wife may not remarry and his property may not be

inherited and the rights of the missing person must be maintained until there is clear evidence whether he is alive or dead.

The power to determine and decide whether a *mafqud* is alive or dead lies on the court based on evidence, investigation or the expiry of waiting period (as determined by the *fuqaha*). When the court decided that the *mafqud* has died, then his time of death is counted as the same time the ruling was issued. The beneficiaries who are present at the time of the court ruling are entitled to inherit the property of the *mafqud*. Similarly, a *mafqud* may inherit a benefactor's property before a court ruling is made against him/her. If the ruling of a *mafqud*'s death has been made by the court, but it turns out later that the supposed *mafqud* is still alive, then he/she would not be able to re-claim the property that has been spent by the beneficiaries, except only to take any leftover property.

4. *TAKHARUJ* DOCTRINE

Although the Islamic Inheritance Law has determined the inheritance of beneficiaries with their respective portions, the law has provided ample space to the beneficiaries to either accept the inheritance or otherwise. A beneficiary's rejection of the inheritance can be done through the *takharuj* doctrine.

Takharuj in the Islamic Inheritance Law means a beneficiary who withdraws himself/herself from accepting the inheritance either in part or in full with one of the beneficiaries, or a few of the beneficiaries by accepting a certain payment (*'iwad*) whether from the inherited property, or other properties, or without any payment. *Takharuj* with payment is a form of *mu'awadah* contract which is accepted by Islamic Law if there is submission or willingness among the beneficiaries involved. The *takharuj* doctrine is practised in inheritance distribution in various forms and with various means of payment solely to provide comfort and freedom to the beneficiaries involved. It should be done with the approval and willingness from the beneficiaries who have rights in the distribution of the inheritance, whether through individual or group beneficiaries and whether with a specific payment or without any payment.

In implementing the *takharuj* doctrine, there are three conditions that may override the execution, namely when the debt claim amount exceeds the available inheritance of the deceased. While the beneficiaries are not ready to pay the debt, then *takharuj* is considered to become null and void. Secondly, if a will claim arises upon the deceased; the claim may cause the actual inherited portion among the beneficiaries to change. Thirdly, when there is an unknown beneficiary before the distribution or at the time of *takharuj*, while his/her presence may cause changes in the rights and the beneficiaries' portions of the inheritance. Based on these three conditions, the *takaruj* doctrine cannot be implemented.

5. CONCLUSION AND SUGGESTIONS

The Islamic Inheritance Law is a commandment of Allah s.w.t. through the *qat'i* verses 11, 12 and 176 of al-Nisa'. These verses describe the rightful beneficiaries of the inheritance and the portions which they deserve such as 1/2, 1/4, 1/8, 1/3, 2/3, or 1/6. The Islamic Inheritance Law has brought some reformations which did not exist in previous laws. Such law has been commanded by of Allah s.w.t. solely to provide justice to all mankind. Thus, the incorporation of the Islamic Inheritance Law has its own philosophy and insight which may not be internalised and embraced by some people today. This law has a clear policy and is comprehensive in nature because it is a commandment from Allah s.w.t. who knows all things.

In order to ensure the implementation and compliance of the Islamic Inheritance Law (*faraid*) on a continuous basis among the Muslims in this country and by the related institutions or agencies in the management of inheritance, it is hereby proposed a number of recommendations, measures and actions which should be undertaken by the responsible party which include:

1. To introduce the Islamic Inheritance Law in the form of written laws (statutes) that can be used as guidelines and common practices in the Syariah courts, Islamic institutions or property management agencies, Islamic Law legal practitioners, corporate companies, trustees and Muslims in Malaysia in general. Some Muslim countries in the Middle

East and in this region have approved the Islamic Inheritance Law in writing such as the Egyptian *Qanun Mawarith* 1943 (for the Non-willed Inheritance Law), the Egyptian *Qanun Wasiyyah* 1946 (for Willed Inheritance Law) and so forth.

2. To review and identify a number of statutes and written laws related to the management of Muslim property currently being enforced in this country so that no provision is inconsistent or in conflict with the Islamic Law such as the Trustee Act 1949, the Small Inheritance (Distribution) 1955 (in particular regarding the provisions related to the *Perpatih* Custom), National Land Code 1965 and so forth.

3. To enhance and expand the jurisdiction of the Syariah Court in the country by returning the administration power of Muslims inheritance to the court as before independence. In order to implement this proposal, an amendment to the Ninth Schedule, Federal Constitution (which contains three lists), must be done wisely.

4. To standardise and streamline the civil jurisdictional boundaries of the Syariah Subordinate Court to the High Court throughout Malaysia so that no significant differences exist, particularly between the Syariah Courts in Peninsular Malaysia with the Syariah Courts in Sabah and Sarawak.

5. The preparation and the issuance of the *Faraid* Certificate or Beneficiary Certificate by the Syariah Court in the states must be made after going through a trial before a *Syarie* Judge, in order to avoid any mistakes from occurring. Complicated inheritance distribution cases should be referred to the State *Mufti* Department for decision.

6. *Faraid* Certificate or Beneficiary Certificate prepared through *E-Faraid* or *E-Syariah* by an Islamic inheritance management agency should first be endorsed by the Judge of State Islamic Law Supreme Court so that the validity of the certificates may not be questioned later. The *E-Faraid*

and *E-Syariah* programmes should be reviewed for the purpose of standardisation.

7. To identify a national level body which will be responsible for overseeing and monitoring the institutions or agencies that are involved, directly or indirectly, with the Muslims wealth management, for example inheritance management, wills, grants (*hibah*), endowments and the likes.

8. To mandatorise the institutions or Muslims property management agencies to appoint their own Syariah Panel so that the syariah products and its operational procedures that are introduced in the market do not contradict the Islamic law.

9. To ensure that all *fatwas* issued by the National *Fatwa* Council that are related to the distribution of inheritance, property nominee, *takaful* and the likes, are fully implemented by the parties concerned.

10. To create awareness and understanding among the Muslim community in Malaysia on Islamic Inheritance Law, wills law, grants, endowments and so forth, by way of conducting seminars, colloquiums, conventions, discussions, dialogues and the likes, either at training centres and so forth.

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